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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1671

DALE C. RICHARDSON,

Petitioner,

vs.

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,
AND
LOCAL 7495,
COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Dale C. Richardson petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on February 13, 1976, petition for rehearing denied March 11, 1976, and motion to stay mandate denied March 22, 1976. The mandate issued March 22, 1976

CITATIONS TO OPINIONS BELOW

The February 13, 1976 opinion of the Eighth Circuit Court of Appeals, not yet reported, is printed in Appendix "A" hereto (A1)[1]. The unreported memorandum decision of June 12, 1975, on the plaintiff's application for attorney fees, and the order thereon by the United States District Court for the District of Nebraska, is printed in Appendix "B" (A15). The October 26, 1973 opinion of the Court of Appeals, reported at 486 F.2d 801, is printed in Appendix "C" (A31). The November 16, 1972 opinion of the Court of Appeals, reported at 469 F.2d 333, is printed in Appendix "D (A40)[2]. The February 29, 1972 unreported memorandum and order of the District Court is printed in Appendix "E" (A43). The June 4, 1971 opinion of the Court of Appeals, reported at 443 F.2d 974, is printed in Appendix "F" (A46). The April 25, 1967 opinion of the District Court, reported at 267 F. Supp. 403, is not relevant to the issues here and has thus not been printed.

JURISDICTION

The judgment of the Court of Appeals (Appendix "A") was entered on February 13, 1976. Subsequent to the March 11, 1976 denial of a petition for rehearing, and subsequent to the March 22, 1976 denial of the motion to stay the mandate, the mandate of the Court of Appeals issued on March 22, 1976.

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[1]The letter "A" followed by a number refers to a page number of the appendix.

[2]Certiorari denied 414 U.S. 818 (1973).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 1651(a).

QUESTIONS PRESENTED FOR REVIEW

I. Must a district court show the standards by which it was guided in calculating an award of attorney's fees? Must such an award based on bad faith of the opposing party represent the reasonable value of the services rendered? Are the litigation expenses claimed as "between solicitor and client costs" waived if not claimed by challenge to the clerk's taxing of costs? Is it an abuse of discretion to award litigation costs to the party against whom a "bad faith" attorney's fee is awarded?

II. May a district court in a suit under Section 301(a), Taft-Hartley Act, instruct the jury that a union is not responsible for the actions of a member unless the union either authorized or ratified the acts in question?

III. What standards must be followed by a district court in ordering a new trial for an excessive verdict? What is the scope of appellate review of such an order?

STATUTORY PROVISIONS INVOLVED

The suit was brought under Section 301(a), Taft-Hartley Act [29 U.S.C. 185(a)], which provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Section 301(e), Taft-Hartley Act [29 U.S.C. 185(e)], bears on the liability of a labor union for the acts of its members, and pertains to the issue in Question II. It provides:

> "For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

STATEMENT OF THE CASE

This action is based on the harassment and unlawful discharge of the petitioner which followed and resulted from his withdrawal of membership from the defendant unions. The petitioner resided in and worked in the State of Nebraska, which prohibits union shop agreements by law under the authority of Section 14(b), Taft-Hartley Act. The facts are well summarized in footnote 12 of Appendix "F" (A62)–the Court of Appeals decision at 443 F.2d 974.

This action under § 301, Taft-Hartley Act [29 U.S.C. 185(a)], against Western Electric Co. (the employer) and the unions, was one for damages for lost compensation and for mental anguish, and was filed on December 21, 1966. There have been 227 filings in the District Court alone. The basis for suit against the unions was breach of fiduciary duty of fair representation, by invidious discrimination against the petitioner by reason of his nonmembership in the union.

The first trial was to a jury, February 17 - 26, 1969. The trial judge dismissed the mental anguish claim and limited the lost compensation claim to that lost during the seven-month period between discharge and expiration of the collective bargaining agreement. The jury's $20,000 verdict against the employer and the unions was reduced by the trial judge to $1,500, after he had first ordered a new trial, then set aside the order on his own motion. Before the new trial order was set aside, Richardson had unsuccessfully petitioned the Court of Appeals for mandamus to reinstate the verdict.

Petitioner appealed from the $1,500 judgment. The Court of Appeals reversed and remanded (Appendix "F") for a second trial. At that trial, the jury returned a $92,000 verdict for lost compensation, allocated 30% against Western Electric Co. and 70% against the unions. It also returned a $250,000 verdict for mental anguish against the unions only. The Court of Appeals opinion had eliminated the employer as a party to the mental anguish claim. A compromise settlement between the employer and petitioner led to dismissal of the employer from the suit.

The District Court ordered a new trial on the mental

anguish claim, holding the verdict to be excessive and the result of passion or prejudice (Appendix "E"). The unions' attempted appeal from the judgment entered on the lost compensation claim, and petitioner's attempted appeal from the order for new trial, were both dismissed as appeals from nonfinal orders (Appendix "D"). This Court denied Richardson's petition for certiorari [414 U.S. 818 (1973)]. After the District Court re-entered judgment with an express determination of "no just cause for delay," the unions again appealed, and the Court of Appeals affirmed (Appendix "C") the judgment on the lost compensation claim. That judgment has been satisfied. At petitioner's request, without opposition from the unions, the District Court deferred hearing on the attorney fee application until disposition of the second claim.

At the third trial, June 3 - 11, 1974, at which the only issues were those of liability and damages for mental anguish against the unions, the jury returned a defense verdict. After a fee hearing on October 15 and October 19, 1974, the District Court ordered the unions to pay a $10,000 attorney fee to the petitioner (Appendix "B"). The decision was silent on that portion of the fee claim which itemized and requested reimbursement for necessary expenditures in connection with the suit. The claim for fees and expenses is printed in Appendix "G."

On petitioner's appeal from the judgment, including the fee award, and the unions' cross-appeal from the fee award, the Court of Appeals affirmed the judgment and fee order, and denied petitioner's request for rehearing. The Court of Appeals had denied petitioner's pre-third trial request for a writ of mandamus to reinstate the verdict and set aside the

new trial order.

ARGUMENT

I

The Court Of Appeals Erred By Refusing To Require Computation Of The Attorney Fee In Accordance With Requisite Standards, By Refusing To Review The Amount Of The Award, By Holding That Expenses Were Recoverable Only By Challenge To The Clerk's Taxing Of Costs, And By Approving The Award Of Third Trial Costs Against The Petitioner.

Testimony and affidavits at the fee hearing showed an expenditure of 2,245 hours of legal work by three attorneys on behalf of petitioner. An expert witness testified at the fee hearing to his estimate that petitioner's undersigned counsel had expended about 1,400 hours attributable to the lost compensation claim, and testified to his opinion of the reasonable value of that 1,400 hours.

The District Court fee award (A15) was based on a finding of bad faith by the unions in the conduct upon which suit was based. The fee order does not reveal how the court arrived at the $10,000 amount.

The fee order contained no findings or computations such as are required by the cases to be cited hereinafter. The pertinent paragraph (A29) of the order read:

> "Accordingly, in recognition of the importance of this case, the hours of labor reasonably attributable to the result achieved here, the alleged

> business lost by the plaintiff's counsel as a result of his participation in this case [there was no such allegation], the compensation due the plaintiff, and all of the other factors present, particularly the liberal award of damages by the jury to the plaintiff, an order will be entered awarding the sum of Ten Thousand Dollars ($10,000) for legal fees in the prosecution of this case."

The petitioner hammered in the Court of Appeals in his opening appellant brief, his appellee brief, his reply brief, his oral argument, his post-argument letter to the Court of Appeals, and his petition for rehearing on the point that the District Court's abuse of discretion included its failure to show how the fee was computed and its failure to show how requisite standards for fee computation were applied.

The Court of Appeals erroneously found that petitioner "failed to separate the portion of his time spent in the unsuccessful prosecution of his claim on Count II." (A14).

The Court of Appeals decision was completely silent on the computations-and-standards issue. The decision's reference (A14) to the discretion involved in an award of attorney fees was: "The allowance of attorney fees rests with the discretion of the trial court and will not be disturbed absent a showing of an abuse of discretion." Such a holding does not recognize that failure to show the standards followed and the computation of the fee constitutes an abuse of discretion. It does not recognize that the discretion involved is in whether a fee is due and that the amount of the award is reviewable.

The attorney fee and expense claim was contained in an affidavit (Appendix "G") filed with the District Court before the fee hearing. That affidavit contained four and one-half legal size pages (A68) itemizing the work done by counsel. Although the affidavit covered work on both the lost earnings and mental distress claims, it was consciously drawn in a manner which would permit segregation, as between the claims, of work done *after* the lost compensation claim was out of the case.

The unions raised no issue in the District Court of non-allocation as between the two claims. Their briefs did not even hint at such an issue until their appellee brief in the Court of Appeals. The District Court was not concerned over any such fancied nonallocation, stating (A27):

> "Finally, the defendants suggest that even if the plaintiff is entitled to recover his fees relating to his prosecution of Count I, he should not be permitted to recover fees relating to Count II since the defendants ultimately prevailed on that count. However, a party need not prevail on every aspect of his complaint in order to recover his fees. *Reed v. Arlington Hotel Company, Inc.*, 476 F.2d 721 (8th Cir. 1973), *cert. denied,* 414 U.S. 854, 94 S. Ct. 153, 38 L. Ed. 2d 103 (1974). Nor is it always that easy to separate fees relating to two separate counts each arising out of the same basic facts. Consequently, while the defendants' suggestion has a certain appeal, it is not practical in every case."

The District Court fee award gives no clue to how it was computed. Footnote 4 (A28) to the fee award opinion con-

fuses the issue, stating that because of the damages award, "a recovery of attorney's fees is no longer called for," and that a fee shifting based upon a finding of bad faith in a § 301 case is both "compensatory and punitive" in nature. That holding is contrary to the Eighth Circuit holding in *United Steelworkers of America v. Butler Manufacturing Co.*, 439 F.2d 1110 (8th Cir. 1971), that a fee award in a "bad faith" case is compensatory in nature.

One thing is clear from the District Court fee order: the fee was not based on the reasonable value of the legal services rendered. It is also clear that the reason that it was not so based was "the liberal award of damages by the jury to the plaintiff." (A29). The itemized claim for necessary expenditures not recoverable as ordinary costs was in the same affidavit as the claim for fees and begins in Appendix "G" at A74.

The expense claim (A74) was contained in the same affidavit as the time claim and covered six and one-half legal size pages. That expense claim was sufficiently detailed to permit allocation between the two claims, with the help of some estimates on items which pertained to both claims.

The unions again raised no issue in the District Court concerning the expense claim. The expense claim was mentioned by the unions on appeal only in a footnote on page 28 of their appellee brief. The Court of Appeals decision adopted the position taken by the unions in that footnote.

The Court of Appeals adopted (A14) the unions' suggestions of "failure to separate" the time spent on each claim and failure to challenge the taxing of costs without ever having seen the claim. Neither the claim affidavit nor

any copy of it ever left the office of the District Court clerk. The affidavit was not included in the appendix or in any filing with the Court of Appeals.

The District Court awarded third trial costs against the petitioner (A30).

A. The fee.

1. Failure to show fee computation was an abuse of discretion.

The bellwether case with respect to guidelines required for computation of an attorney fee is *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974). The *Johnson* guidelines are: (1) the time and labor required (" . . . they are a necessary ingredient to . . . be considered" [page 717]); (2) the novelty and difficulty of the questions; (3) the skill required to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

The foregoing *Johnson* guidelines are consistent with the American Bar Association's Code of Professional Responsibility, Ethical Consideration 2-18, Disciplinary Rule 2-106.

Johnson also held, at pages 716-717, that the discretion confided to a district judge with respect to fee awards is the discretion to determine whether a fee should be awarded, holding further that a Court of Appeals may review whether the award was in a reasonable amount.

The Eighth Circuit has followed the *Johnson* guidelines in cases other than this one. In *Doe v. Poelker*, 515 F.2d 541, 548 (8th Cir. 1975), 527 F.2d 605, 606-607 (8th Cir. 1976), the Court of Appeals demanded that the District Court follow *Johnson* in its fee computations, remanded the case for such computations, and subsequently approved a computation which followed the *Johnson* guidelines. In a decision by the same author as here, the Eighth Circuit held that " . . . the 'only legitimate starting point' in establishing fees is 'by merely multiplying attorney's hours and typical hourly rates . . . ' " *Grunin v. International House of Pancakes*, 513 F.2d 114, 127 (8th Cir. 1975).

"A logical beginning in valuing an attorney's services is to fix a reasonable hourly rate for his time." *Lindy Bros. Builders v. American R. & R. San. Corp.*, 487 F.2d 161, 167 (3rd Cir. 1973).

"The inquiry begins with a determination of the time devoted to the litigation. This figure in turn is multiplied by an hourly rate." *National Treasury Employees Union v. Nixon*, 521 F.2d 317, 321 (D.C. Cir. 1975).

"The failure to consider such factors [those in *Johnson, supra*] constitutes an abuse of discretion." *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975).

"While we are not permitted to substitute our judgment for that of the District Court' . . . we can review

the bases for the decision on fees and revise it if necessary." *Swanson v. American Consumer Industries, Inc.*, 517 F.2d 555, 559 (7th Cir. 1975).

"While the Court below made a passing reference [to *Johnson, supra*] . . . there was scant explication of the Court's application of the guidelines which we took pains to formulate." *Miller v. Mackey International, Inc.*, 515 F.2d 241, 242 (5th Cir. 1975).

"Since the record fails to supply the information necessary to apply the *Lindy* standard, it is clear that the award . . . was inconsistent with the sound exercise of discretion." *Estien v. Christian*, 507 F.2d 61, 65 (3rd Cir. 1975).

" . . . [W]e are convinced that the method whereby the judge computed the award of attorney's fee was so lacking in analysis that it constituted an abuse of discretion." *Waters v. Wisconsin Steel Works of International Harvester Co.*, 502 F.2d 1309, 1322 (7th Cir. 1974).

"[The district court's] failure to follow proper standards in awarding fees . . . [was] inconsistent with the sound exercise of discretion." *City of Detroit v. Grinnell Corporation*, 495 F.2d 448, 473-474 (2d Cir. 1974).

" . . . [A] meaningful review requires a record that elucidates the factors that contributed to the fee decision and upon which it was based. Certainly it is not conducive to an appropriate appellate review where, as here, the reviewing tribunal is completely in the dark as to what the trial judge found concerning the time and labor involved, the rate of compensation, and the aspects he may have deemed of significance. *Evans v. Sheraton Park Hotel*, 503 F.2d 177, 188 (D.C. Cir. 1974).

"Because our review is dependent upon some sort

of record of the basis for the decision below, we vacate the judgment insofar as it relates to the attorney's fee and remand the cause to the district court for findings of fact and conclusions of law as to the amount of any attorney's fee awarded." *Monroe v. Board of Commissioners of City of Jackson, Tennessee*, 505 F.2d 105, 109 (6th Cir. 1974).

"Where a District Court errs as a matter of law by utilizing improper standards or procedures in determining fees, an abuse of discretion occurs . . . . Similarly, clearly erroneous findings of fact require reversal." *Merola v. Atlantic Richfield Company*, 493 F.2d 292, 295 (3rd Cir. 1974).

"His attorneys should not be denied compensation for reasons not apparent on the record." *Green v. Transitron Electric Co.*, 326 F.2d 492, 499 (1st Cir. 1964).

"Where, as in this case, there is nothing in the record to indicate what factors the trial judge deemed important in making an award, there can be no basis for adhering to the rule of discretion." *Ellis v. Flying Tiger Corporation*, 504 F.2d 1004, 1006 (7th Cir. 1972).

2. The fee award must represent the reasonable value of the services rendered.

That the District Court erred in awarding the fee on some basis other than the reasonable value of the services rendered is shown by the holding in *Tillman v. Wheaton-Haven Recreation Assn., Inc.*, 517 F.2d 1141, 1148 (4th Cir. 1975) that " . . . when an allowance of attorneys' fees was justified, it should be measured by the reasonable value of the lawyer's services."

"The fee should represent the reasonable value of the services rendered . . . . " *Wilderness Society v. Morton*, 495 F.2d 1026, 1036 (D.C. Cir. 1974).

A requirement of a reasonable attorney's fee was held "to require the district court to award a fee that would approximate the customary fee in the community for similar work." *Singer v. Mahoning County Board of Mental Retardation*, 519 F.2d 748, 749 (6th Cir. 1975).

In the decisions of both the District Court and the Court of Appeals is an implicit assumption that the attorney fee awarded was not required to be measured by the reasonable value of the services rendered. Also, the Court of Appeals reference (A14) to the plaintiff's failure to separate the time "spent in prosecuting his claim on Count II" is without justification in the record. That reference completely ignores the itemization in the fee affidavit, as well as the testimony of the plaintiff's expert witness, a respected and well-known trial attorney, that undersigned counsel had spent 1,400 hours on Count I, the lost-compensation count. The time spent on that count could only have been established by estimate. An unbiased estimate was in evidence and was called to the attention of the Court of Appeals. That Court in seeking a basis to affirm the District Court chose one neither relied upon by the District Court nor supported by the evidence.

Undersigned counsel neither demanded nor applied for a $168,375 fee. He testified to the number of hours expended and his opinion of the reasonable hourly value of each hour. Multiplication of those two factors produces $168,375. If the $250,000 verdict had been reinstated, such a fee would have been justified. Absent its reinstatement, a fee of $168,375 was not expected.

3. Recovery of compensatory damages and payment of a contingent fee from the award does not justify awarding a fee smaller than the reasonable value of the attorney's services.

The District Court fee decision, as has been mentioned, relied on "the liberal award of damages by the jury" (A28, note 4; A29) to justify a small fee. The Court of Appeals took a related but different approach, apparently justifying the size of the fee by reason of the "[s]izeable attorney fees . . . collected by plaintiff's attorney . . . on a contingent fee basis" (A14, note 11). Such positions of the District Court and the Court of Appeals reflect a misconception of the nature of fee awards. Actually, a larger recovery should have justified a larger fee; a larger contingent fee collected by plaintiff's attorney should justify a larger fee award in order to make plaintiff whole, assuming the contingent fee to have been a reasonable one. The fee paid here was 45% of the approximate $92,000 collected. The fee agreement had started at 33-1/3% after one trial and had progressively increased for additional work to a ceiling figure of 45%.

It must be remembered that the $92,000 award represented compensation that the jury found that the petitioner had lost by the unlawful discharge procured by the unions. The unions should pay an absolute minimum of $40,000, the approximate contingent fee which was paid, so as to make the petitioner whole. Although undersigned counsel has a contingent interest in any fee award, the larger portion of the award will go to petitioner to reimburse him in part for the contingent fee which he has paid.

" . . . the ultimate purpose behind any recovery in such a case, making the employee whole . . . , suggests that the employee may need some financial assistance to press his claim and, if successful, should retain a substantial portion of the jury's 'lost earnings' award for himself. Finally, the cost of attorney's fees is an injury to the employee directly attributable to and necessitated by the failure of the union and/or the employer to utilize . . . grievance procedures . . . without resort to the courts."

De Arroyo v. Sindicato de Trabajadores Packing, AFL-CIO, 425 F.2d 281, 293, note 17 (1st Cir. 1970).

"Adequate compensation is necessary, however, to enable an attorney to serve his client effectively, and to preserve the independence of the profession."

Johnson v. Georgia Highway Express, Inc., supra, 488 F.2d 714, 719-720 (5th Cir. 1974).

It is permissible to include in a fee award compensation for services rendered solely to obtain an allowance of fees. *Rosenfeld v. Southern Pacific Co.*, 519 F.2d 527, 530 (9th Cir. 1975).

B. The expense claim.

1. Denial of expense award.

The unions raised no issue in the District Court on the expense claim, and the District Court was completely silent on that claim. The unions' only mention of the expense claim on appeal was in a footnote in its appellee brief contending that the claim was waived by failure to challenge the clerk's taxing of costs. The net claim presented to the District Court was $6,616.91. The Court of Appeals adopted the unions' position that the claim was waived by failure to challenge the taxing of costs (A13, note 10).

It should be noted here that $1,966.52 has been taxed as costs and collected by petitioner, and that the expenses now claimed are not of the type with which Rule 54(d) deals. By its erroneous position, the Court of Appeals removes expenses from the category of "costs as between solicitor and client" and requires that such expenses be claimed at a different time and in a different fashion than the attorney fees. There is no legal requirement nor custom nor even any authority which requires such expenses to be claimed by challenging the clerk's taxing of costs. Rather, the custom is and has been that expenses are claimed and awarded along with the attorney fees, since both are costs "as between solicitor and client." The Court of Appeals took an unanswerable contention and answered it with a new rule which has never been applied before in any federal court.

"As we stated in *Sprague v. Ticonic National Bank*, . . . , allowance of counsel fees and other expenses entailed by litigation, but not included in the ordinary taxable costs regulated by statute, is 'part of the historic equity jurisdiction of the federal courts.' " *Vaughan v. Atkinson*, 369 U.S. 527, 530 (1962).

This Court in *Sprague v. Ticonic National Bank, supra*,

307 U.S. 161 (1939), noted (footnote 2, page 166) that allowance of costs "as between solicitor and client" had been held within the authority of the federal courts, and also noted at pages 165-166 that costs "as between solicitor and client" included "as much of the entire expenses of the litigation of one of the parties as fair justice to the other party will permit."

"Court costs not subsumed under federal statutory provisions normally granting such costs against the adverse party . . . are to be included in the concept of attorney's fees." *Fairley v. Patterson,* 493 F.2d 598, 606, n. 11 (5th Cir. 1974).

" . . . [T]hey [courts of equity] have awarded litigation expenses, including reasonable attorneys' fees, to the prevailing party." *McClure v. Born Chemical Co.,* 292 F.2d 824, 835 (3rd Cir. 1961).

"In *Trustees v. Greenough,* 105 U.S. 527, 26 L. Ed. 1157 (1881), an order awarding a plaintiff counsel fees and expenses . . . was held to be 'a final decree,' because ' . . . the inquiry was a collateral one, having distinct and independent character . . . ' ." *Cinerama, Inc. v. Sweet Music, S.A.,* 482 F.2d 66, 70, n. 2 (2d Cir. 1973).

Kiser v. Huge, 517 F.2d 1237, 1253 (D.C. Cir. 1974), dealt with and affirmed a District Court award of both expenses and attorney fees.

Kerr v. Screen Extras Guild, Inc., supra, 526 F.2d 67, 69-70 (9th Cir. 1975), involved a remand to determine whether Kerr was "entitled to recover litigation expenses, including reasonable attorney's fees."

"In their petitions . . . [for] attorneys' fees . . . plaintiff's attorneys . . . [included a request for] reimbursement for out-of-pocket expenses of $4,595.11, not covered by the earlier award of taxable costs . . . . [The District Court awarded the claimed expenses and there was no appeal from that portion of the award]." *Swanson v. American Consumer Industries, Inc., supra,* 517 F.2d 555, 561 (7th Cir. 1975).

"Moreover, the Court appears to have ignored the application for costs in the amount of $3,941.57." *Miller v. Mackey International, Inc., supra,* 515 F.2d 241, 242, n. 1 (5th Cir. 1975).

Some of the Court of Appeals errors are not apparent from the face of the decision. Its erroneous position, however, in its footnote 10 (A13) creates a new procedure for claiming expenses in "solicitor and client costs," thus splitting the expense and fee claims, and demanding that expenses be claimed by challenge to the clerk's taxing of costs–a taxing which frequently occurs long before the expenditures are complete. This requirement puts the Eighth Circuit in conflict with all other circuits which have dealt with the matter. Apart from the split in the circuits thereby created, such an odd and unusual and unnecessary requirement should be dealt with by this Court in the exercise of its supervisory powers.

No case has been found where recovery of some sizeable fee or expense to which a party may be entitled has been completely barred because of some failure to meet some time schedule during the normal course of the litigation. Petitioner's counsel vigorously rejects any contention that he was required to claim expenses by challenging the clerk's taxing of costs. However, if he was so required, it would have been appropriate to afford him another oppor-

tunity to obtain the relief to which he was entitled, rather than dismissing such a sizeable claim on a basis not theretofore found in any case, statute, or rule, especially since there was no showing of any prejudice to the unions or the court.

" . . . [T]he time required [for filing a motion for review of a cost bill] is not jurisdictional and the court may entertain a tardy motion for review." 6 Moore's Federal Practice, 54.77[9], page 1755.

" . . . [A] petition for reimbursement of costs as between solicitor and client may be treated as a proceeding supplementary to the main proceeding that created the fund." 6 Moore's Federal Practice, 54.77[9], page 1756.

C. The award of costs against petitioner.

In a case which has gone on as long as this one, it is easy to forget how it was that the third trial came about. The District Court in the first trial struck the mental anguish claim from the complaint. In an excellent opinion (A46), holding that damages for mental anguish could be recoverable in a § 301 case, the Eighth Circuit authorized the plaintiff to amend his complaint to state a claim for damages for mental anguish against the unions.

The complaint was amended, the second trial was had, and the jury made an award of $250,000 damages on the claim. The District Court ordered a new trial. The plaintiff-petitioner tried an appeal and a petition for mandamus and a petition for certiorari, in efforts to avoid the third trial, but was unsuccessful. The only settlement offer ever made by the unions was one for $5,000 made before the second

trial. Thus, petitioner had no choice but to go to trial for a third time.

Given the outcome of that trial and the deficiencies in it which were shown to the Court of Appeals, not to have taken an appeal would have been unthinkable to any lawyer. Yet, the Court of Appeals has displayed some impatience with the case. The first words spoken were as petitioner's counsel stood to open his argument, when the Court said to him, "I'm wondering whether there will ever be an end to this litigation."

It was an abuse of discretion to award third trial costs against the plaintiff. The first jury, the second jury, the District Court, and the Court of Appeals all found bad faith on the part of the unions, a breach of the unions' fiduciary duty of fair representation, by procuring the plaintiff's discharge. When a plaintiff such as here has been literally forced to litigate in an effort to obtain his rights, should the "bad faith" unions recover their costs against him?

"The purpose of the award [of fees and costs], the Court emphasized, was to encourage people to seek judicial redress of unlawful discrimination." *Tillman v. Wheaton-Haven Recreation Assn., Inc., supra,* 517 F.2d 1141, 1148 (4th Cir. 1975).

" . . . [T]o bar allowance of attorneys' fees . . . would deter private suits challenging suspect interpretations of Title VII." *Rosenfeld v. Southern Pacific Company, supra,* 519 F.2d 527, 529-530 (9th Cir. 1975).

Small coal operators who prevailed on only one of their two claims against the United Mine Workers and some large coal operators were the prevailing parties and were entitled to their costs. *Lewis v. Pennington,* 400 F.2d 806, 820 (6th

Cir. 1968).

It seems incongruous and contrary to the equitable principles which underlie fee awards to first split up the plaintiff's claims, then to award him an attorney fee based on the bad faith of his opponents, then to award third trial costs against him to his "bad faith" opponents.

It was within the District Court's discretion to order each party to bear its own costs or even to find that petitioner was the prevailing party in the action as such and award him costs. In any event, the Court of Appeals erred in approving the District Court's abuse of discretion in ordering petitioner to pay the unions' third trial costs.

II

The Court Of Appeals Erred By Approving A Jury Instruction That Acts Of Members Did Not Bind The Unions Without Authorization Or Ratification.

A jury instruction (the entire charge to the jury is printed in Appendix "H") submitted by the unions was given to the jury by the District Court (A92):

> "The members of the Defendant Local Union are not agents of the Defendant Local Union. The actions of an individual member of the Defendant Local Union do not bind the Defendant Local Union unless the Defendant Local Union either authorized or ratified the acts in question."

Such an instruction was diametrically opposed to § 301(e) [29 U.S.C. 185(e)], a subsection of the section under which suit was brought. That subsection provides:

> "For the purposes of this section, in determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

Petitioner's counsel specifically excepted to the instruction (A99).

At this point, a brief factual summary may be in order. The facts shown at all three trials were substantially the same, and are well-summarized by the Court of Appeals in footnote 12 (A62) of its decision at 443 F.2d 974 (Appendix "F").

After withdrawing from the union because of inability to get an accounting of the Local's expenditure of some funds, petitioner and two other employees were subjected daily to multiple mass demonstrations by union members, stewards and officers. They were cursed, threatened, harassed, and tormented daily for almost seven months, in an attempt to get them to strike one of their tormentors so that the Company could fire them. Company officials turned their backs or watched with no attempt to stop the misconduct.

Richardson's wife was called a whore, a steward cleared his throat and spat a gob of phlegm into Richardson's face, Richardson was pelted from behind with nuts and bolts and other thrown objects while sitting at his workbench, his work was sabotaged, his car was blocked in the Company parking lot, and he was burned with a lighted cigarette.

The president of the defendant Local, one Harllee, was one of the ringleaders. Minutes of Local meetings, some of which were altered between trials, showed President Harllee admonishing the members that the violence must stop. At

the same time, a column written by President Harllee–published in a publication put out by the Local–condemned the three nonmembers as leeches, inviting contributions to buy them a one-way ticket to Hell.

After seven months of unsuccessful harassment, the unions "set up" the petitioner and the Company fired him. Officers of the Local on more than one occasion demanded of Company officials that petitioner be fired. The International sent a representative to a Local meeting where the topic of discussion was the penalty to be imposed upon those members not participating in a "wildcat" strike, a "spontaneous" protest of a suspension imposed on a member for tormenting petitioner. All union members, officers, and stewards at work that day, except one, participated in the strike.

No union or Company witness in any of the trials denied the basic facts of the harassment. The only defense raised in each trial was that the harassment was by individuals and was not the work of the unions. In oral argument before the Court of Appeals, in response to the Court's question, counsel for both sides agreed that the third trial verdict hinged on agency.

Petitioner pointed out other deficiencies in the instructions to the Court of Appeals, but he relies here on only one, the giving of the instruction in direct conflict with § 301(e). The Court of Appeals dismissed petitioner's contentions concerning the instructions in a single paragraph (A9):

> "Plaintiff next complains that certain agency instructions were erroneous. The Court's instructions with respect to the unions' responsibility for the conduct of their officers, stewards,

> and members were thorough, and in conformance with the ordinary doctrines of agency which were applicable. *Gibbs, supra,* 383 U.S. at 736; *Wagner Electric Corp. v. Local 1104, Int'l. Union of Radio and Machine Workers,* 496 F.2d 954 (8th Cir. 1974). Plaintiff's objections failed to take into consideration the instructions as a whole. We are satisfied from our examination of the instructions that no error was committed therein."

It is incomprehensible how the Court of Appeals could say that the instruction complained of was "in conformance with the ordinary doctrines of agency," and that it did not constitute error.

United Mine Workers v. Gibbs, 383 U.S. 715 (1966), cited by the Court of Appeals, deals with § 6, Norris-LaGuardia Act [29 U.S.C. § 106]. That section provides:

> "No officer or member of any association or organization participating or interested in a labor dispute, shall be held responsible or liable in any Court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or ratification of such acts after actual knowledge thereof."

The *Gibbs* decision not only does not support the Court of Appeals decision, it refutes it. *Gibbs* refers to the adoption of the Labor-Management Relations Act and to the provisions of § 301(e) as requiring that the responsibility of a union for the acts of its members and officers be measured by reference to ordinary doctrines of agency "rather than the more stringent

standards of § 6.

The other case cited by the Court of Appeals in support of its holding on the instructions was its own *Wagner Electric Corp. v. Local 1104, Int'l. Union of Radio and Machine Workers,* 496 F.2d 954 (8th Cir. 1974). Petitioner is in wholehearted agreement with the holding of that case that (page 956) "a union is responsible for the actions of its officers and members according to the ordinary doctrines of agency." The case gives no support whatsoever to a holding that the "authorized or ratified" instruction was in conformance with the ordinary doctrines of agency.

"*Vulcan* reaffirmed the principle that no *actual* authority of agents is required for union responsibility as long as they are acting within the scope of their apparent authority." *United States Steel Corp. v. United Mine Workers of America,* 519 F.2d 1249, 1253 (5th Cir. 1975).

After quoting § 301(e), *Vulcan Materials Co. v. United Steelworkers of America,* 430 F.2d 446, 457 (5th Cir. 1970), states: "In other words, the act of a union agent committed within the scope of his general authority is binding upon the union regardless of whether it was specifically authorized or ratified."

"The jury was properly instructed that the Unions were responsible for the acts of their representatives only if the latter were engaged within the scope of their employment or authority, but that actual authorization of specific acts was unnecessary. 29 U.S.C.A. § 185(e)." *Lewis v. Benedict Coal Corporation,* 259 F.2d 346, 352 (6th Cir. 1958).

The jury received an instruction which was a gross misstatement of the applicable law of agency. Even the sentence

commencing the paragraph was prejudicially erroneous. It stated flatly:

> "The members of the Defendant Local Union are not agents of the Defendant Local Union."

How could a jury following that instruction possibly have returned a plaintiff's verdict based on the acts of members of the defendant Local? That sentence alone was the equivalent of a directed verdict on the non-agency of the members.

The errors were not minor ones. They dealt with the gravamen of the issue on which the verdict hinged. The "authorized or ratified" portion was diametrically opposed to the statute.

"Error in a specific instruction is not cured by general statements which set out the respective contentions . . . . Erroneous instructions in a jury trial are presumptively injurious and are grounds for reversal unless it affirmatively appears on the record that the error was harmless." *Northern Pacific Railway v. Herman,* 478 F.2d 1167, 1171 (9th Cir. 1973).

" . . . [I]t is well settled that a reversal will be directed unless it appears beyond doubt that the error complained of did not and could not have prejudiced the rights of the party." *Vicksburg & Meridian Railroad Co. v. O'Brien,* 119 U.S. 99, 103 (1886).

"Since it does not affirmatively appear that the confusion in the minds of the jury which would naturally flow from the error in the charge did not in fact prejudice the appellant, the judgment must be reversed . . . . " *Plough v. Baltimore & O. R. Co.,* 172 F.2d 396, 398 (2d Cir. 1949), *cert. denied,* 337 U.S. 940.

"Defendant contends, however, it [an erroneous instruction] was harmless error since other parts of the charge stated the law correctly. We do not agree. The challenged statement was not equivocal or subject to differing interpretation which might be clarified by other portions of the charge. We cannot assume the jury disregarded it. At best, it was likely to leave the jury highly confused, that alone being grounds for reversal. . . . The judge was in fact explaining to the jury precisely what plaintiff had to prove to recover. . . . An erroneous statement of the law at that point cannot be described as harmless." *De Lima v. Trinidad Corporation,* 302 F.2d 585, 587 (2d Cir. 1962).

Where issues of agency and ratification were critical fact issues, and the court gave an erroneous charge to the jury on such issues, it was determined that the error was not harmless and a new trial would be granted. *NMS Industries, Inc. v. Premium Corp. of America, Inc.*, 451 F.2d 542 (5th Cir. 1971).

" . . . [T]he rule that instructions must be considered as a whole is not applied to cure error by conflicting instructions." *Reid's Branson Instructions to Juries,* Vol. I, § 138, page 393 (1960).

"If an erroneous and a correct instruction are given on a material matter, a new trial must be granted. The jury does not know which one is correct and the court does not know which one the jury followed." *Reid's Branson Instructions to Juries,* Vol. I, 1974 Cum. Supp., § 138, page 75.

III

The District Court Abused Its Discretion In Ordering A New Trial, And The Court Of Appeals Erred As To The Permissible Scope Of Review On Such An Order.

A. New trial versus limited new trial or remittitur.

The order for a new trial (A43) specified no misconduct or error, but found that the $250,000 verdict on the mental distress claim was so excessive that it must have been the result of "passion, prejudice, mistake, or some other improper reason" (A44). Although the unions' motion was one for a remittitur, for judgment n.o.v. only upon refusal to remit and for a new trial *only* as an alternative to judgment n.o.v., the District Court ordered a new trial on its own motion. Was not the unions' motion a concession of the validity of the jury's finding of liability?

The decisions of the Eighth Circuit Court of Appeals permit an inference of passion or prejudice to be drawn from the size of the verdict alone. In *Bankers Life & Casualty Company v. Kirtley,* 307 F.2d 418, 426 (8th Cir. 1962), the Court upheld a finding that the verdict was the result of passion or prejudice and stated in so holding that " . . . there is here no affirmative evidence other than the size of the exemplary damage award to indicate passion or prejudice on the part of the jury."

In both *Perry v. Bertsch,* 441 F.2d 939 (8th Cir. 1971) and in *Bankers, supra,* the Eighth Circuit held that a verdict resulting from passion or prejudice does not bar a remittitur and does not necessarily require a new trial. These holdings

are consistent with the widely quoted words of Judge Medina in *Dagnello v. Long Island Railroad Company*, 289 F.2d 797, 802 (2d Cir. 1961):

> "In some cases the very amount of the verdict is said to justify the inference that the verdict was brought about by passion or prejudice, although it seems to us that this is just another way of saying that the verdict is too high."

A complete new trial for an excessive verdict is required only where the verdict resulted from "appeals to passion or prejudice" (*Minneapolis & Sault Ste. Marie Ry. v. Moquin*, 283 U.S. 520, 521 (1931)) and is not required where the passion or prejudice is merely inferred from the size of the verdict alone, as shown by *Bankers* and *Perry*, *supra*. Or is a complete new trial required where the defense post-trial motions do not request it?

Since the District Court found no specific error nor any *appeal* to passion or prejudice, it was free to order a remittitur or a new trial limited to the issue of damages. The Court of Appeals contention that the liability and damages issues were so intertwined as to be inseparable (A7) was adopted from page 23 of the unions' brief and is not supported by logic. Additionally, that union position was first advanced on appeal and not in the District Court.

The unions' contention that damages for mental anguish are arrived at by determining a dollar value for the damage flowing from each act attributable to the unions, and then totaling all of such dollar values, is a sophism unsupported and unsupportable by any citation of authority. Liability and damages are not intertwined in a case involving deliberately induced mental anguish.

A verdict of liability would be required if the jury found that the unions set out to deliberately induce mental anguish in the petitioner and that their efforts even slightly succeeded, irrespective of the dollar value of that damage. The jury would then find the damages attributable to the mental anguish caused by the unions. The evidence showed no other source of mental anguish. If the unions actually believed that the issues of liability and damages were so inextricably intertwined, should they not have submitted and should not the District Court have given instructions to the jury on how to handle such an "adding machine" type of damage calculation and on its complexities? No such instruction was even suggested.

One might think from the "adding machine" contention that the unions defended by presenting evidence about how some specific individuals, and not the unions, were responsible for particular acts. Not so. They simply denied all responsibility for everything. It was a case for the jury of all or nothing.

At the second trial (and at the third trial), the issue of liability was not even a close one. The unions' only defense was one of nonagency. The evidence of agency was overwhelming. The only evidence of nonagency was that of self-serving exculpatory statements by the unions, condemned as ineffective by *Riverton Coal Co. v. United Mine Workers of America*, 453 F.2d 1035, 1042 (6th Cir. 1972), by *Vulcan Materials Co. v. United Steelworkers of America, supra*, 430 F.2d 446, 457 (5th Cir. 1970), and by the Eighth Circuit in *Wagner Electric Corp. v. Local 1104, International Union of Electrical, Radio and Machine Workers, supra*, 496 F.2d 954, 956 (8th Cir. 1974).

A common sense approach to the new trial issue is suggested in the following quotation from *McCormick on Damages*, § 19 at 80-81 (1935):

> "For passion produced by unfair tactics or argument of the successful party, the threat of an unconditional new trial may well be the only effective preventive. In those cases, however, where the facts themselves are so appealing to the sympathies or prejudices of the average man that any jury is likely to render a swollen verdict, then, if the plaintiff's counsel has not by unfair methods whipped up the natural emotions of the jury, to require another trial seems questionable policy. In these cases, an opportunity to reduce the award as an alternative to a new trial might well be offered to the plaintiff wherever the trial judge is satisfied with the justness of the result on the question of liability. To insist that no verdict stand until the jury gives a verdict free of passion and prejudice both in respect to liability and in respect to amount is in these appealing cases to expect an impossibility."

Union counsel made much in the appeals briefs of an alleged "Golden Rule" argument made by petitioner's counsel. However, the trial judge, whose discretion the unions would uphold in every other respect, summarily overruled the objection, not even stopping the argument nor considering it as error.

Since "passion or prejudice" inferred only from the size of the verdict cannot possibly infect the finding of liability, the District Court could have ordered either a remittitur (as

requested by the unions) or a new trial limited to the issue of damages. Its failure to do either constituted an abuse of discretion.

B. The District Court misconstrued the nature of damages flowing from deliberately induced mental distress.

The new trial order displayed a misconception of the nature of the mental distress damages authorized by the 1971 Court of Appeals decision. Out of the several varieties of such mental distress damages, that which was authorized was damages for the mental distress flowing from an intentional wrong. Such damages contain elements not found in mental distress damages which flow from other sources.

The law requires that negligently inflicted mental distress be accompanied by physical injury in order to be compensable. The cases hold that changes in the nervous system which flow from mental distress are physical injuries. *Alcorn v. Anbro Engineering, Inc.*, 2 Cal. 3d 493, 498, 86 Cal. Rptr. 88, 468 P.2d 216 (1970); *Vanoni v. Western Airlines*, 247 Cal. App. 2d 793, 796-797, 56 Cal. Rptr. 115 (1967); *Emden v. Vitz*, 88 Cal. App. 2d 313, 317, 198 P.2d 696 (1948).

Vanoni, supra, held at pages 796-797 that " . . . a shock to the nervous system is an injury to the body rather than to the mind." Headnote 3 in *Vanoni* states: "The allegation in a complaint that plaintiffs suffered severe shock to their nerves and nervous systems *alleges something more than emotional or mental suffering*" (emphasis added).

The mental distress flowing from intentional wrongs is compensable without any necessity of physical injury or injury to the body. *Restatement of the Law of Torts 2d*, § 46, pp. 77-

78; Prosser, *Law of Torts* (4th Ed. 1971) § 12, page 5b.

Even so, the District Court's order for new trial finds (A44, A45) the verdict excessive and unsupported by the evidence because there was no showing that the emotional state caused was of a "permanent and lasting nature," because no "serious psychosomatic illnesses resulted," and because "the trauma caused, if any, was of a temporary duration." As shown by *Alcorn, Vanoni*, and *Emden, supra,* "permanent and lasting" damage to the emotions, "serious psychosomatic illnesses," and "trauma" other than temporary, as demanded by the District Court, are all physical injuries. Borrowing the language of the *Vanoni* headnote, the District Court was demanding "something more than emotional or mental suffering." The "permanent" injury demanded by the District Court was an approach doubtless borrowed from the familiar rules in bodily injury cases that only permanent injuries will support a substantial damage award. The mental distress damages in issue are compensation for the invasion of mental tranquility rather than for their visible long-term effects.

Justice Traynor held in *State Rubbish Collector's Association v. Siliznoff,* 38 Cal. 2d 330, 338, 240 P.2d 282 (1952):

> "Greater proof that mental suffering occurred is found in the conduct designed to bring it about than in the physical injury that may or may not have resulted therefrom."

Since physical injury is not an element of the mental distress damages here in issue, the District Court's new trial order applied an erroneous standard and constituted

an abuse of discretion. Application of the wrong legal standard is an error of law and an abuse of discretion in determining whether to grant a new trial. *Williams v. Nichols,* 266 F.2d 389, 392-393 (4th Cir. 1959).

The petitioner's briefs in the Court of Appeals, as well as his oral argument, dealt with the above issue at some length. His arguments in this respect were dismissed (A7, note 5) as "devoid of merit." This refusal of the Court of Appeals to find an abuse of discretion in the District Court's application of erroneous legal standards as to mental distress was error.

C. Scope of appellate review of new trial order.

> "Review of a ruling on a motion for new trial on the ground of an excessive verdict is similar to the reviewability of the trial court's ruling on a motion for new trial on the ground that the verdict is against the weight of the evidence. But the pressure for review is greater in the area of inadequacy and excessiveness, since only by review of the trial court's ruling on the motion for new trial may the quantum of damages, where the amount is in dispute, be tested in the appellate court." 6A Moore's Federal Practice § 59.08[6], pages 59-170, 171 (2d Ed. 1974).

There is a split between the circuits on the standards for review of an order for new trial for an excessive verdict. There is, in fact, a split within the Eighth Circuit itself. The earlier Eighth Circuit position, and that relied upon

here (A6) was " . . . we shall continue to consider review [of an order granting or denying a new trial for an excessive or inadequate verdict], as we have said before, not routinely and in every case, but only in those rare situations where we are pressed to conclude that there is 'plain injustice' or a 'monstrous' or 'shocking' result." *Solomon Dehydrating Co. v. Guyton,* 294 F.2d 439, 447-448 (8th Cir. 1961).

Then, in 1972, the Eighth Circuit adopted a new and different approach to the problem, which approach was urged by petitioner's briefs as applicable here. The case was *Fireman's Fund Insurance Co. v. Aalco Wrecking Co., Inc.,* 466 F.2d 179, 186-187 (8th Cir. 1972). The decision discussed the scope of review by a Court of Appeals on an order for a new trial.

Some of the pertinent holdings of *Fireman's Fund* are as set forth hereafter: that a grant of a new trial on the basis of instructions or rulings on evidence does not interfere with the jury's role as the trier of fact; that courts may not reweigh the evidence and set aside the verdict just because different inferences could have been drawn or because the judge felt that other results were more reasonable; that the Court of Appeals should exercise a closer degree of scrutiny and supervision to protect the right of jury trial before a new trial is ordered because the trial judge found the verdict contrary to the weight of the evidence; that to justify a new trial, the verdict must be against the *great* weight of the evidence; that otherwise, the jury's role as trier of the facts would be destroyed and the trial judge would be enabled to disregard the jury's verdict at will; that the ultimate issue on a motion for new trial is whether a miscarriage of justice occurred; and that *a district court's new trial decision is*

always subject to review.

Fireman's Fund seemed to herald the advent of desperately needed new rules, different rules than *Solomon's* near-nonreviewability rule. *Fireman's Fund's* "always subject to review" is in direct conflict with *Solomon's* "not routinely and in every case."

As the Court's latest expression on the subject of scope of review, the *Fireman's Fund* decision should have been applied here and petitioner's briefs urged its application. However, one would never learn from the Court of Appeals decision that *Fireman's Fund* had ever been handed down. For the Eighth Circuit to maintain two diametrically opposed rules, and to apply whichever of the two it chooses, is hardly consistent with the rule of law. Such procedure deserves the attention of this Court in the exercise of its supervisory powers.

Leaning in the same direction as *Fireman's Fund,* but still adopting somewhat different standards, is the decision of the District of Columbia Circuit in *Taylor v. Washington Terminal Co.,* 409 F.2d 145, 148-149 (D.C. Cir. 1969), where it was held that review of a new trial order for an excessive verdict requires a Court of Appeals to weigh the trial judge's first-hand observations of the evidence against the different evaluation of the facts by the constitutionally-designated fact-finders, the jury.

The *Taylor* court held that the proper test to be applied by the District Court was whether the award was clearly within the maximum limit of a reasonable range. The Court also held that the verdict there was within such a range and reversed the order for a new trial.

Both *Taylor* and *Fireman's Fund* cited and relied on *Lind v. Schenley Industries, Inc.,* 278 F.2d 79 (3rd Cir. 1960),

cert. denied, 364 U.S. 385 (1960). Other recent cases which follow *Taylor* are: *Brewer v. Uniroyal, Inc.,* 498 F.2d 973, 978 (6th Cir. 1974); *Williams v. Steuart Motor Co.,* 494 F.2d 1074, 1085 (D.C. Cir. 1974); *Manning v. Altec, Inc.,* 488 F.2d 127, 133 (6th Cir. 1973); and *Gorsalitz v. Olin Mathieson Chemical Corp.,* 429 F.2d 1033, 1045-1047 (5th Cir. 1970).

The instant case draws into sharp focus the conflict between the *Solomon* standards, the *Fireman's Fund* standards, and the *Taylor* standards, at least a three-way split, thus offering an excellent vehicle for resolving the split among the circuits (and within the Eighth Circuit) on the standards for review of verdicts alleged to be either excessive or otherwise against the weight of the evidence. This Court is, of course, aware of the tumult in the legal profession over arbitrary grants of new trials at both the state and federal level. The California problem in this respect typifies the common problem in all jurisdictions, and is discussed at length in *Mercer v. Perez,* 68 Cal. 2d 104, 108-124, and in *New Trial Orders; The Erosion of Code of Civil Procedure Section 657,* 9 Santa Clara Lawyer 119 (1968).

The near-absolute discretion which the Eighth Circuit and some other circuits permit the trial judge in new trial orders is nothing more nor less than deprivation of the right to trial by jury.

The application here of *Fireman's Fund* or *Taylor* could have produced a reversal or modification of the order for a new trial. The Court of Appeals, however, followed *Solomon* and refused to review the order. Such refusal was error.

The new trial order contained no findings of fact. It contained no specifications of error nor did it specify any

source for the jury's alleged "passion, prejudice, mistake, or . . . other improper reason." The order contained no review of the evidence, no findings as to what the weight of the evidence showed and, of course, could not and did not contain any showing that the verdict was against the *great* weight of the evidence, or that it represented a miscarriage of justice. It contained no finding of a maximum range or that the verdict was outside a maximum range. The order made no reference to the outrageous union conduct which was calculated to bring about mental anguish in the petitioner. These findings and references were required under the cases which have been discussed, and the condonation by the Court of Appeals of their absence constituted error.

CONCLUSION

The three points made in this petition, the first of which contains several subpoints, form a pattern: the Court of Appeals has refused to enforce the normal rules of law which it applies in other cases. It permitted the District Court to make an arbitrary fee award without any showing of how the figure was reached. It sustained the District Court's complete silence on a substantial claim for expenses, a claim to which the unions raised no defense in the District Court. It ratified an award to the "bad faith" union of its third trial costs against the petitioner. It approved an instruction requiring union authorization or ratification of a member's acts as one in conformance with the ordinary doctrines of agency. It approved the District Court's use of an erroneous measure of damages for mental distress. It avoided any mention of its own later pronouncement on review of new trial

orders, referring instead to an earlier and inferentially-overruled doctrine more favorable to an affirmance of the District Court.

Why has the Court of Appeals gone out of its way to affirm the District Court's multiple arbitrary postiions? When the District Court's dismissal of the mental anguish claim was reversed, it achieved the same result as before by granting a new trial on the second trial verdict and by grossly misinstructing the jury in the third trial. The District Court obviously felt that damages for mental anguish were inappropriate and took steps to see that none were paid. If these arbitrary acts are truly unreachable, then the right to trial by jury is only an illusion.

Did the Court of Appeals decide that the petitioner had "received enough" by way of the damages he had collected on the first claim? Such a position would be hardly consistent with the judicial duty to avoid prejudice by extraneous and irrelevant matters. Juries are not permitted to learn of such dispositions of other claims, and it has never been thought necessary to conceal such from appeals court judges.

Did the Court of Appeals grow impatient with the long-continued litigation? If so, why not terminate it earlier in some of the multiple opportunities extended? The snail's pace of the case was not attributable to the petitioner. The only delay he ever sought was a one-month delay of the second trial, and that request was denied by the District Court in a decision sternly emphasizing the need for speedy dispositions of matters in the federal courts! That decision made no reference to the two-year span between complaint and first trial, or the delay of over thirteen months in entering judgment

after the first trial. From that decision one would not have anticipated that the District Court would take five months to act on the unions' motion for remittitur after the second trial, nor the entry of judgment one year to the day after the third trial verdict. Petitioner once, to no avail, asked the Court of Appeals to assign the case to another District Judge.

Would the weariness of a Court of Appeals with the District Court's overdeliberate pace entitle it to terminate the suit on a basis other than the merits, in disregard of the rights of one of the parties?

Was the unusual position on the expense claim due to some fear that any expense award would go to reimburse the National Right to Work Legal Defense and Education Foundation, Inc.? The District Court, throughout the three trials and the fee hearings, has displayed (on the record) a great deal of interest in the role of that organization in the case. Petitioner's undersigned counsel, on every such occasion, has unhesitantly taken the opportunity to describe the relationship between the petitioner and the Foundation. The petitioner has personally contributed about $1,250 of the total expenditures. The Foundation has made advances since 1967, as requested by undersigned counsel who initiated the first contact, for necessary expenses (no attorney fees) in an amount of over $11,000, and has never in any way attempted to influence the handling of the case.

The petitioner could not have litigated even through the first trial without the Foundation's help. Without the assistance of such an organization, an individual worker is at the mercy of powerful employers and unions, powerless to enforce the federal labor laws purportedly enacted for his benefit.

The petitioner's right to demand the compliance of the unions with their fiduciary duty of fair representation is a civil right. It is not necessary to go as far as *Collum v. Butler*, 288 F. Supp. 918, 919 (N.D. Ill. 1968), *affirmed* 421 F.2d 1257 (7th Cir. 1970), in demanding extra consideration for the verdict (as opposed to the judge's views on a motion for new trial) in a civil rights case. It is only demanded that the petitioner be judged by impartial application of the same rules as in other cases.

Some of the deficiencies in the Court of Appeals decision are couched in language which does not reveal the full import of the ruling. One who had not read the District Court memorandum or the briefs would not realize that the Court of Appeals had approved a failure of the District Court to show how the fee was computed. Nor would a reader of the opinion realize that the Court of Appeals was approving the "authorized or ratified" instruction as one within the ordinary doctrines of agency. If fee computations truly need not be shown, and if the ordinary doctrines of agency have been broadened, the facts should be spelled out in the decision, so that it may stand as precedent for those points.

The decision, however, does contain two visible errors which will undoubtedly be cited as precedents:

(1) Expenses above and beyond and outside the usual taxable costs, which expenses are included in the concept of "costs as between solicitor and client," may be claimed only by challenging the clerk's taxing of costs, and may not be sought in the same claim as the fee.

(2) Where substantial compensatory damages are recovered, where a sizeable contingent fee is paid on

such a recovery, and where "bad faith" requires a fee award, the District Court may award a fee which represents less than the reasonable value of the legal services rendered.

The two points specified above are in conflict with the decisions herein cited of other Courts of Appeals on similar issues. Both points present issues of importance under federal labor law. All of the issues raised in this petition involve a sanctioning by the Court of Appeals of departures so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's powers of supervision. All are issues of importance under federal labor law. Some, as specified, involve splits among the circuits.

Because the decision deals with court-awarded fees in an arena where the individual worker is pitted against the union and the employer, it will be of particular interest to lawyers with an opportunity to represent individual workers in such cases. Whereas very few of such cases had been filed before the 1971 decision of the Court of Appeals, a substantial number have been filed and are pending across the nation since that decision was published (Appendix "F," A46).

Affidavits of labor law specialist Donald W. Jones, a Missouri attorney; of the distinguished Jonathan C. Gibson with his wide experience in labor law across the nation and across the years; of the well-known and widely-written Sylvester Petro, professor of labor law at New York University and at Wake Forest–such affidavits having been filed with the District Court–point out the difficulty of the individual worker in finding competent counsel to represent him against his employer and the union.

This Court of Appeals decision will constitute another obstacle in the path of the worker seeking effective representa-

tion. It will stand for the principle that lawyers representing workers against labor unions face rules not applicable in other cases involving the same issues. It will signal that such a lawyer may end up donating a substantial portion of his time. The significance of the decision will not be lost on the legal profession.

WHEREFORE, the petitioner prays that a writ of certiorari issue to review the judgment entered February 13, 1976, petition for rehearing denied March 11, 1976, by the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on MAY 17, 1976, I served the within PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT (DALE C. RICHARDSON vs. COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, LOCAL 7495, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO) of the following named parties by depositing three copies thereof (to each party), enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

ROBERT E. O'CONNOR
1304 City National Bank Bldg.
Omaha, Nebraska 68102

J. PATRICK GREEN
707 City National Bank Bldg.
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DAVID S. LATHROP
460 Continental Bldg.
Omaha, Nebraska 68102

I declare under penalty of perjury that the foregoing is true and correct.

Executed on MAY 17th 1976, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

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